No. _____

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1998

GLORIA BYLINSKI, GLORIA BELLMAN, ALLAN COLLINS, DENNIS COATES, DOUGLAS HAMMAR, ROBIN HAMMAR, SANDRA HOLIDAY, STEVEN HOLIDAY, ROBERT JARRELL, ANISE PIERCE, RICHARD PRESSEY, JIMMY SEACRIST, and MOLLY SEACRIST, and all other persons similarly situated,

Petitioners,

-v-

CITY OF ALLEN PARK, a Michigan municipal corporation, CHARTER TOWNSHIP OF BROWNSTOWN, a Michigan municipal corporation, CITY OF ECORSE, a Michigan municipal corporation, CITY OF LINCOLN PARK, a Michigan municipal corporation, CITY OF RIVER ROUGE, a Michigan municipal corporation, CITY OF ROMULUS, a Michigan municipal corporation, CITY OF SOUTHGATE, a Michigan municipal corporation, CITY OF TAYLOR, a Michigan municipal corporation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

There are two questions presented on appeal. First, whether the Sixth Circuit opinion below is in direct conflict with the Seventh Circuit regarding the application of the All Writs Act, 28 U.S.C. 1651(a), to obtain federal jurisdiction over non-parties in order to protect the integrity of a federal consent decree. Second, whether the Sixth Circuit was without authority when it upheld the finding of federal jurisdiction over a third party state constitutional law claim filed in state court so as to protect the integrity of a federal consent decree, to which the Petitioners were not a party, absent statutory authority.

PARTIES TO THE PROCEEDING

All of the parties on the caption were before the Court of Appeals. Those parties were: Gloria Bylinski, Allan Collins, Dennis Coates, Steven Holiday, Sandra Holiday, Richard Pressey, Jimmy Seacrist, Molly Seacrist, Gloria Bellman, Anise Pierce, Douglas Hammar, Robin Hammar, Robert G. Jarrell, City of Allen Park, Charter Township of Brownstown, City of Ecorse, City of Lincoln Park, City of River Rouge, City of Romulus, City of Southgate, and City of Taylor.

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Petitioners, Gloria Bylinski, Allan Collins, Dennis Coates, Steven Holiday, Sandra Holiday, Richard Pressey, Jimmy Seacrist, Molly Seacrist, Gloria Bellman, Anise Pierce, Douglas Hammar, Robin Hammar, and Robert G. Jarrell, (hereinafter Petitioners) respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit has been recommended for publication and is reported at *Bylinski v. City of Allen Park*, 1999 FED App. 0092P (6th Cir.). App. A at 1a. Of the two opinions of the United States District Court for the Eastern District of Michigan, Southern Division, that are at issue, only one has been published and can be found at *Bylinski v. City of Allen Park*, 8 F.Supp.2d 965 (1998). App. B at 7a. The other opinion of the District Court at issue and is unpublished has been attached beginning at page 29a of the Appendix. App. C at 29a.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on January 25, 1999. App. A at 1a. This Court is conferred jurisdiction upon this Petition pursuant to 28 U.S.C. § 1245(1).

STATUTORY PROVISIONS INVOLVED

The All Writs Act, 28 U.S.C. § 1651(a), states:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The Headlee Amendment, Mich. Const. 1963, art 9, § 31, states in pertinent part that:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or Charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or Charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon.

STATEMENT OF THE CASE

The facts of this case are simple, straight forward, and undisputed. The Respondents, in this case, assessed a local tax upon real and personal property without a vote of the qualified electors. In doing so, the Respondents intentionally violated the Headlee Amendment to the Michigan Constitution, Mich. Const. 1963, art. 9, § 31 (hereinafter Headlee Amendment). Pursuant to the Michigan Constitution and Michigan statutory law, jurisdiction of the

Petitioners' Headlee Amendment claim is vested exclusively in the Michigan Court of Appeals or in the Circuit Courts for the State of Michigan. Mich. Const 1963, art. 9, § 32; M.C.L.A. § 600.308a.

Although federal jurisdiction, as set forth in 28 U.S.C. § 1331, 1332, is admittedly absent, the lower courts upheld the removal of the Petitioners' state constitutional law case from state court because of the perceived interference of the Petitioners' case with the District Court's enforcement of a consent decree in the federal district court case, *United States v. Wayne County*, Civ. Action No. 87-70992 (E.D. Mich., Feikens, J.). Due to the lower courts use of *Wayne County* to obtain jurisdiction over Petitioners' state constitutional law case, a review of the facts and procedures surrounding this case and the *Wayne County* case is necessary in order to address the jurisdictional issues raised herein.

A. Statement of facts

The federal case of *Wayne County*, *supra*., arose from the State and Federal governments enforcement of the Clean Water Act, 33 U.S.C § 1251 et seq. The purpose of the federal lawsuit was to ensure that Wayne County and the downriver local governments in Michigan, which included the Respondents[1] in this action, complied with federal affluent treatment levels. After ten years of litigation, the government parties (the only litigants in *Wayne County* were governments) in the federal case eventually negotiated a mutually agreed upon Consent Decree and Final Judgment.

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[1] The Respondents in this case are as follows: City of Allen Park, Charter Township of Brownstown, City of Ecorse, City of Lincoln Park, City of River Rouge, City of Romulus, City of Southgate, and City of Taylor.

Pursuant to the Consent Decree and Final Judgment, Wayne County issued limited tax obligation bonds to finance the cost Wayne County incurred in its construction and improvements to Wayne County's waste treatment facilities; the repayment of Wayne County's limited tax obligation bonds were solely the responsibility of Wayne County and not the downriver local governments. The downriver local governments were to reimburse Wayne County for part of the cost Wayne County incurred in Wayne County's construction and improvements to Wayne County's waste treatment facilities.

In the *Wayne County* Final Judgment, the Respondents expressly confessed their intent to violate the Headlee Amendment to the Michigan Constitution, Mich. Const. 1963, art. 9, § 31, so as to satisfy their assigned reimbursement cost to Wayne County. The defendants in *Wayne County*, which included the Respondents in this case, agreed between themselves and "assured" the District Court that the Respondents would not "contest" the imposition of the tax; a tax that was in excess of, and in violation of, applicable charter, statutory and constitutional limitations. In other words, the Respondents', agreed to willfully impose upon the Petitioners, without prior popular vote approval of the qualified electorate, a new tax, unconstitutional on its face. To insure the government parties' complacency regarding the Respondents' intent to violate the Headlee Amendment to the Michigan Constitution, the District Court[2] issued the an Injunction on May 12, 1994, whereby the District Court enjoined any one, including non-parties, from conducting any type of proceeding that would interfere with

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[2] The same District Court judge presided over both this case and the *Wayne County* case.

the implementation of Consent Decree and the Final Judgment.

In accordance with their intent set forth in the Consent Decree, the Respondents levied and collected a new tax (hereinafter Judgment Tax) upon the Petitioners - residents and taxpayers who reside within one of the Respondents. Labeled variously as the sewer tax, EPA levy, or Wayne County Judgment on the Petitioners' real property tax bill, the Judgment Tax was never submitted by the Respondents for popular vote, nor was the Judgment Tax approved by the Petitioners by popular vote pursuant to the Headlee Amendment to the Michigan Constitution, Mich. Const. 1963, art. 9, § 31.

In addition, there are several important facts that should be noted. First, the Petitioners were never parties or in privity with any of the parties in *Wayne County, supra.* Second, the Petitioners' were never subject to the jurisdiction of the federal court in *Wayne County, supra.* Third, the Petitioners were never provided notice of the Injunction. Finally, and most importantly, the Petitioners never consented to the Respondents levy and collection of the Judgment Tax. In sum, the Respondents' taxation of the Judgment Tax violated the Headlee Amendment to the Michigan Constitution, and thus, requires the Respondents to refund to the Petitioners all monies the Respondents unconstitutionally collected from the Petitioners.

B. Course of proceedings and disposition below

On March 4, 1998, the Petitioners, on behalf of themselves and all others similarly situated, filed suit in Wayne County Circuit Court, State of Michigan, alleging a sole state constitutional claim against the Respondents as a result of the Respondents' violation of the Headlee Amendment to the Michigan Constitution, Mich. Const. 1963, art. 9, § 31. The unconstitutional tax at issue was voluntarily levied and collected without consent by vote of the qualified electorate in order to satisfy the Final Judgment in *Wayne County*, *supra*.

On March 23, 1998, the Respondents, pursuant to 28 U.S.C. §§ 1441(a) and (b) and 1446, filed their Notice of Removal. Following which, the Petitioners filed a Motion for Remand, Motion for Recuse and Affidavit for Disqualification of Judge on April 13, 1998. On April 15, 1998, the Respondents filed a Motion to Incorporate the entire record of *Wayne County*, *supra*., into the record of this proceeding.

The District Court heard oral arguments on the Petitioners' two Motions and Affidavit and on the Respondents' Motion to Incorporate the Record on May 21, 1998. At the conclusion of the hearing, the District Court denied the Petitioners' Motion for Remand, Motion for Recuse and Affidavit for Disqualification of Judge and granted the Respondents' Motion to Incorporate the Record. On June 9, 1998, the District Court issued a written Opinion and Order Denying the Petitioners' Motion to Recuse and a written Opinion and Order Denying the Petitioners' Motion for Remand. In the Remand opinion the District Court held

that removal was proper because of the courts "inherent power to enforce agreements entered into in settlement of litigation pending before them." App. C at 30a- 31a (citations omitted). The District Court also held that removal was proper based upon the All Writs Act, 28 U.S.C. § 1651(a). App. C at 31a. It is important to note that the District Court did not find any independent basis of federal jurisdiction beyond the perceived interference with the Consent Decree in *Wayne County, supra.*

Also on June 9, 1998, the District Court entered in Order granting the Respondents' Motion to Incorporate the Record.

On May 12, 1998, the Respondents filed their Motion for Summary Judgment pursuant to F.R.C.P. 56. On May 19, 1998, the Petitioners also filed a Motion for Summary Judgment pursuant to F.R.C.P. 56. Before oral arguments were heard on the Petitioners' and Respondents' Motions, the Petitioners filed a Stipulation and proposed Order, in part, amending the Petitioners' Complaint as follows: adding the City of Romulus and the Charter Township of Brownstown as Defendants; adding Gloria D. Bellman, Anise Pierce, Douglas Hammer, Robin Hammar and Robert G. Jarrell as named Plaintiffs; and withdrawing George Coates d/b/a D&A Collision as a named Plaintiff. On June 9, 1998, the District Court entered the Petitioners' aforementioned Stipulation and proposed Order Amending the Petitioners' Complaint.

On June 1, 1998, the District Court heard oral arguments on both the Petitioners' and the Respondents' Motions for Summary Judgment. From that hearing, the District Court issued a written Opinion and Order, on June 9, 1998, granting the Respondents' Motion for Summary

Judgment dismissing the Petitioners' case. In doing so, the District Court significantly overextended the authority of a federal district court to enforce federal judgments and misconstrued and misapplied Michigan law regarding the Headlee Amendment to the Michigan Constitution, laches, and the Bigger Doctrine. The District Court also ignored the Respondents' express admission to violating the Headlee Amendment.

On appeal to the Sixth Circuit, the Petitioners sought review of the District Court's denial of the Petitioners' Motion for Remand and the District Court's grant of the Respondents' Motion for Summary Judgment. Upon review, the Sixth Circuit affirmed the District Court's Order denying Petitioners' Motion for Remand. According to the Sixth Circuit, the federal court was conferred jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1245(1), and pursuant to the court's authority to protect the "integrity" of its consent decrees.

The Sixth Circuit also affirmed the District Court's grant of Respondents' Motion for Summary Judgment. However, unlike the District Court, the Sixth Circuit declined to rule upon whether the Petitioners had stated a valid state constitutional law claim; instead, the Sixth Circuit affirmed only the District Courts finding that laches barred Petitioners' case.

REASONS FOR GRANTING THE WRIT

I. THE PETITION SHOULD BE GRANTED BECAUSE THE SIXTH CIRCUIT OPINION BELOW IS IN DIRECT CONFLICT WITH THE SEVENTH CIRCUIT REGARDING THE APPLICATION OF THE ALL WRITS ACT, 28 U.S.C. § 1651(a), TO OBTAIN FEDERAL JURISDICTION OVER NON-PARTIES IN ORDER TO PROTECT THE INTEGRITY OF A FEDERAL CONSENT DECREE.

Petitioners request this Court to grant this Petition because the Sixth Circuit opinion below is in direct conflict with the Seventh Circuit regarding the application of the All Writs Act, 28 U.S.C. § 1651(a), to obtain federal jurisdiction over non-parties in order to protect the integrity of a federal consent decree.

In affirming the District Court's denial of the Petitioners' Motion for Remand based upon the All Writs Act, 28 U.S.C. § 1651(a), the Sixth Circuit held that:

> We also agree that the district court correctly invoked 28 U.S.C. § 1651(a), that All Writs Act, which gives federal court the authority to remove an otherwise unremovable state court case in order to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained. *In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425, 1431 (2nd Cir. 1993) (internal quotation marks omitted).

App. A at 5a. However, contrary to the District Court's Opinion and the Sixth Circuit's affirmation, the All Writs Act is not a vehicle for establishing federal court jurisdiction. As stated in *Mongelli v. Mongelli*, 849 F.Supp. 215 (S.D.N.Y. 1994), in declining to rely on the All Writs Act and thereby holding the court lacked subject matter jurisdiction, the All Writs Act is not a catch-all statute granting jurisdiction when all else fails. *Mongelli, supra.* at 220. Or as this Court has held:

> Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate.

Pennsylvania Bureau of Correction v. United States Marshals Serv., 474 U.S. 34, 43 (1985). Most importantly, the All Writs Act does not provide an independent basis of jurisdiction; it can aid, but it cannot be relied upon as the sole and singular basis of federal jurisdiction. *Hillman v. Webley*, 115 F.3d 1461 (10th Cir. 1997); *Auburn Medical Center, Inc. v. Peters*, 953 F.Supp. 1518 (M.D. Ala. 1996).

Here, the Petitioners have asserted a single state constitutional taxation claim. The state constitutional provision at issue, the Headlee Amendment, Mich. Const. 1963, art. 9, § 31, was enacted to insure that certain procedural and constitutional requirements are met before any tax may be assessed, collected and/or levied against a Michigan taxpayer. *Taxpayers Allied for Constitutional Taxation v. Wayne County*, 537 N.W.2d 596, 450 Mich. 119 (1995). Application of the Headlee Amendment will not interfere or set aside the District Courts Consent Decree or

Final Judgment. It is the assessment and levy of a municipal tax by the Respondents to pay the amounts owed under the *Wayne County* Final Judgment which is the core of Petitioners' claim. As the Petitioners' Headlee Amendment claim does not depend upon a question of federal law and a jury can reach a finding as to the violation of the constitutional provision without addressing a federal statute, the Petitioners' suit is not removable. *Thompson v. Merrell Dow Pharmaceuticals Inc.*, 766 F.2d 1005 (6th Cir. 1985).

Since there exists no independent basis for federal court jurisdiction of the Petitioners' state constitutional law claim, the All Writs Act cannot be utilized to remove Petitioners' case. Briefly, however, the Petitioners' respond to the lower court's reliance on *In re Agent Orange Product Liability Litigation*, 996 F.2d 1425 (2nd Cir. 1993), for the proposition that the All Writs Act supports removal of the Petitioners' Complaint.

In re Agent Orange Product Liability Litigation involved an attempt by the plaintiff, who was an unnamed class member in a federal court class action, to circumvent the federal class action court settlement by filing suit in state court.[3] The plaintiff, who never opted out of the federal class action, sought to re-litigate the same issues that were fully decided upon by the federal class action.

The Second Circuit found that "[a] review of the arguments, orders and judgment in *Agent Orange I* makes it crystal clear that the court in fact did determine the central issue [raised by the plaintiff]". *In re Agent Orange Product*

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[3] Unlike the plaintiff in *In re Agent Orange Product Liability Litigation*, the Petitioners were not parties or in privity with any of the parties to the Consent Decree in the *Wayne County* case.

Liability Litigation, supra. at 1432. Based upon this finding, the Second Circuit upheld the district court's ruling that federal jurisdiction was proper under the All Writs Act. However, the Second Circuit was quick to point out the limitations associated with the All Writs Act in obtaining federal jurisdiction over state law claims: "In so holding, we are not unmindful of the fact that the All Writs Act is not a jurisdictional blank check which district courts may use whenever they deem it advisable." *In re Agent Orange Product Liability Litigation, supra.* at 1431.

This case, instead, should be controlled by *Application of County Collector of Winnebago County,* 96 F.3d 890 (7th Cir. 1996), as the two cases factually and legally parallel each other. The plaintiffs in *Winnebago County* challenged in state court the constitutional authority of their local governmental officials who had imposed a local tax in violation of the state constitution. The funds raised by the alleged unconstitutional tax were to be applied as payment on a federal consent decree. Much like in this case, the enforcement of the plaintiffs' state constitutional claim would not set aside the federal consent decree, nor would it undermine issues previously litigated and decided upon in the previous federal court case. In reversing the district court's application of the All Writs Act to obtain jurisdiction over the plaintiffs' state constitution case filed in state court, the *Winnebago County* court held:

> [I]n a case such as this where a consent decree was entered without findings of liability or necessity, the All Writs Act does not permit the removal of a third-party action claiming that a party to the consent decree acted without authority under state law.

Winnebago County, supra. at 901-902.

In contradiction to the express limitations to the All Writs Act espoused by the Seventh Circuit, the District Court and the Sixth Circuit utilized the All Writs Act simply to preclude a collateral attack on a local tax as unconstitutional pursuant to the Headlee Amendment to the Michigan Constitution; the All Writs Act should not be used to hide the Respondents agreement to violate the Michigan Constitution. Therefore, because of the overwhelming factual similarities and the divergent legal positions between the Sixth and Seventh Circuits, this Court must grant this Petition in order to rectify the conflict.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE SIXTH CIRCUIT WAS WITHOUT AUTHORITY WHEN IT UPHELD THE FINDING OF FEDERAL JURISDICTION OVER A THIRD PARTY STATE CONSTITUTIONAL LAW CLAIM FILED IN STATE COURT SO AS TO PROTECT THE INTEGRITY OF A FEDERAL CONSENT DECREE, TO WHICH THE PETITIONERS WERE NOT A PARTY, ABSENT STATUTORY AUTHORITY.

Petitioners request this Court grant their Petition because the Sixth Circuit was without authority when it upheld the finding of federal jurisdiction over a third party state constitutional law claim filed in state court so as to protect the integrity of a federal consent decree, to which Petitioners were not a party, absent statutory authority. In finding federal jurisdiction, the Sixth Circuit held:

> The district court correctly noted that implementation and enforcement of compliance with the 1994 consent decree gave it continued jurisdiction over the financing agreements that constituted an integral part of the order, citing *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013, 1018 (6th Cir. 1995). The court further found that the instant lawsuit poses an imminent threat to the integrity of the Financing Orders because it could affect the financing mechanism in those orders. We agree.

App. A at 4a. However, the lower court's reliance on *Vanguards of Cleveland* for this proposition as applied in this case is misplaced and unfounded.

The court in *Vanguards of Cleveland* never addressed whether a district court could obtain federal jurisdiction over a non-party's state constitutional law claim filed in state court in order to effectuate a federal court consent decree never agreed to by the state court plaintiffs. Instead, the focus of *Vanguards of Cleveland* was on the authority the federal courts have in modifying consent decrees. By applying the rules pertaining to modification of consent decrees as between parties to obtain jurisdiction over non-parties, as occurred in this case, the *Bylinski* lower courts excessively expanded federal court jurisdiction and significantly distorted the holding in *Vanguards of Cleveland.*

Notwithstanding the fact that *Vanguards of Cleveland* never touched upon the issue at hand, the foundation against the extension of federal jurisdiction based upon a consent decree, absent statutory authority, can be found in the

Vanguards of Cleveland opinion. According to the *Vanguards of Cleveland* court, "[o]nce approved, the prospective provisions of the consent decree operate as an injunction." *Vanguards of Cleveland, supra.* at 1018 (quoting *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983)). And, it is because of the "injunctive quality" of the consent decree that enables the court to retain jurisdiction over the enforcement of the consent decree. *Vanguards of Cleveland, supra.*

However, the courts injunctive authority is not unlimited. It has long been held that "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Martin v. Wilks*, 490 U.S. 755, 761-762 (1989) (citations omitted). Similarly, an injunction can have no force or effect upon one not a party to a legal proceeding. F.R.C.P. 65(1)(d); *Chase National Bank v. City of Norwalk*, 291 U.S. 431 (1934). The principle of limited federal jurisdiction was best summarized by Judge Learned Hand in *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832 (2nd Cir. 1930). According Judge Hand:

> [N]o court can make a decree which will bind any one but a party; . . . It cannot lawfully enjoin the world at large, no matter how broadly it words it decree. . . . It is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in court.

Alemite Mfg. Corp., supra. at 832-833 (quoted in *Swetland v. Curry*, 188 F.2d 841, 843 (6th Cir. 1981)).

The fact that a consent decree is at issue does not alter this basic principle. "Consent decrees are contracts. Their force comes from the agreement of the parties, not from the statute on which the complaint was based." *Dunn v. Carey*, 808 F.2d 555, 559 (7th Cir. 1986) (citing *Firefighters Local 93 v. City of Cleveland*, 478 U.S. 501 (1986)). As this Court held in *Martin*, *supra.*, "[a] voluntary settlement in the form of a consent decree between one group . . . cannot possibly settle, voluntarily or otherwise, the conflicting claims of another group . . . who did not join in the agreement." *Martin*, *supra.* at 2188; See also *Dunn v. Carey*, 808 F.2d 555, 560 (7th Cir. 1986) ("Third parties, not even colorably bound by the decree, also should be able to challenge the authority of the person assenting to the decree."). "While parties can settle their litigation with consent decrees, they cannot agree to 'disregard valid state laws', (citations omitted), and cannot consent to do something together that they lack the power to do individually." *Perkins v. City of Chicago Heights*, 47 F.3d 212, 216 (7th Cir. 1995).

This limitation of federal jurisdiction, even when the court is attempting to protect the integrity of a consent decree, was emphasized in *Winnebago County*, *supra.* As previously noted, the *Winnebago County* plaintiff tax objectors filed suit in state court alleging violations of Illinois state constitutional tax law by the defendant school district, seeking a refund of all taxes illegally collected by the defendant. The taxes were levied by the school district under the direction of a federal court consent decree, entered in a previous case, which sought to remedy alleged racial discrimination in the school district; the plaintiff tax objectors were not a party to the federal district court case.

The principal argument of the tax objectors was that the school district did not have the authority to levy the "consent decree" tax. The school district responded by removing the plaintiffs' state case. The federal district court held that it had jurisdiction over the state law tax case "because the state tax cases could effectively frustrate the school district's implementation of the consent decree entered in the discrimination lawsuit." *Winnebago County*, *supra.* at 892. The Seventh Circuit disagreed with the lower court. According to the Seventh Circuit, "the tax objectors who were not parties to the consent decree, are not bound by the consent decree and are entitled to 'their own day in court' to challenge actions taken under the decree." *Winnebago County*, *supra.* at 895 (citing *Martin*, *supra.* at 762). As a result, the Seventh Circuit held that:

> Because a consent decree's force comes from agreement rather than positive law, the decree depends on the parties authority to give assent . . . . Third parties, not even colorably bound by the decree, . . . should be able to challenge the authority of the person assenting to the decree. Some rules of law are designed to limit the authority of public officeholders, to make them return to other branches of government or to the voters for permission to engage in certain acts. They may chafe at these restraints and seek to evade them; if they do, the people for whose protection the restraints were created are entitled to repair to the forums designed to hear arguments that officeholders have acted without authority.

Winnebago County, supra. at 901.

This extension federal jurisdiction to cover non-parties when such non-parties conduct "poses an imminent threat to the integrity of the [Consent Decree]"[4] directly conflicts with the "injunctive quality"[5] that govern the court's authority over a consent decree. For this reason, this Petition should be granted so that this Court can reaffirm the basic principals of the court's authority over the enforcement of a consent decree and thereby restrict the expansion of federal jurisdiction absent statutory authority.

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4 App. A at 5a.

5 *Vanguards of Cleveland, supra.* at 1018.

CONCLUSION

The jurisdiction issues in this case provide the Court with an excellent opportunity in which to clarify the jurisdictional limitations placed upon the federal court's enforcement of federal consent decrees. If the lower court's opinions are allowed to stand unabridged, the potential for further abuses by state governmental parties in using a federal consent decree, and the power of the federal courts, when compliance with state constitutional and statutory limitations of their authority is inconvenient, will definitely increase. By granting this Petition, the Court can not only prevent such future abuses, but also rectify the direct conflict between the Sixth and Seventh Circuits as to the application of the All Writs Act to obtain federal jurisdiction over non-parties in order to protect the integrity of a federal consent decree. In doing so, this Court can reaffirm the basic principle of limited federal jurisdiction. As such, Petitioners respectfully request that their Petition for writ of certiorari be granted.

Respectfully submitted,

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GLORIA BYLINSKI et al., Plaintiffs-Appellants, v. THE CITY OF ALLEN PARK et al., Defendants-Appellees.

No. 98-1725

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1999 U.S. App. LEXIS 1221

January 25, 1999, Filed*

DISPOSITION: AFFIRMED.

COUNSEL: For GLORIA BYLINSKI, ALLAN COLLINS, DENNIS COATES, STEVEN HOLIDAY, SANDRA HOLIDAY, RICHARD PRESSEY, JIMMY SEACRIST, MOLLY SEACRIST, GLORIA D. BELLMAN, ANISE PIERCE, DOUGLAS HAMMAR, ROBIN HAMMAR, ROBERT G. JARRELL, Plaintiffs - Appellants: Peter W. Macuga, II, Macuga, Swartz & Little, Detroit, MI.

For THE CITY OF ALLEN PARK, CITY OF LINCOLN PARK, CITY OF RIVER ROUGE, CITY OF SOUTHGATE, CITY OF TAYLOR, MICHIGAN, Defendants - Appellees: Charles N. Raimi, R. Craig Hupp, Bodman, Longley & Dahling, Detroit, MI.

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* This was originally issued as an "unpublished decision" filed on January 25, 1999. On March 5, 1999, the court designated the opinion as one recommended for full-text publication.

For CITY OF ECORSE, Defendant - Appellee: R. Craig Hupp, Bodman, Longley & Dahling, Detroit, MI.

For THE CITY OF ALLEN PARK, Defendant - Appellee: Kenneth D. Kruse, Allen Park, MI.

For CITY OF ECORSE, Defendant - Appellee: Victor T. Mitea, Taylor, MI.

For CITY OF LINCOLN PARK, Defendant - Appellee: Edward M. Zelenak, Lincoln Park, MI.

For CITY OF RIVER ROUGE, Defendant - Appellee: David A. Bower, River Rouge, MI.

For CITY OF SOUTHGATE, Defendant - Appellee: John F. Gilhool, Southgate, MI.

For CITY OF TAYLOR, MICHIGAN, Defendant - Appellee: Carl B. Downing, Sommers, Schwartz, Silver & Schwartz, Southfield, MI.

JUDGES: BEFORE: NELSON, SILER, and DAUGHTREY, Circuit Judges.

OPINION: PER CURIAM. This class action suit was brought originally in state court by a group of disgruntled taxpayers seeking a refund of taxes paid and an injunction against further taxation by the defendant municipalities, based on the plaintiffs' claim that the defendants lacked authority to levy taxes without the referendum required by a recent amendment to the Michigan state constitution. The defendants removed the action to federal court, on the ground that the taxes in question had been levied pursuant to a federal consent decree entered four years earlier. Because the district court found that it had continuing jurisdiction under the consent decree,

the court denied the plaintiffs' motion to remand to state court and granted summary judgment to the defendants on the merits. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 1994, the district court entered a consent decree in an action brought by the State of Michigan and the United States Environmental Protection Agency under the Clean Water Act, 33 U.S.C. §§ 1251 et seq., to remedy illegal discharges of raw sewage and other pollutants into Michigan waterways. Pursuant to that decree, Wayne County and certain down-river communities were directed to make cash contributions to a fund to update wastewater treatment facilities. The decree also effectively provided that communities unable to make the mandated payments would be required to increase taxes in order to meet their assessments. When a number of the municipalities were forced to levy taxes to ensure compliance with the court order, the citizen plaintiffs initiated this suit in Michigan state court for a refund of their increased tax payments and to enjoin further tax collections. The suit, however, was not filed until four years after entry of the consent decree in the federal action and three years after implementation of the actual tax levies. By that time, the renovation projects were 85 percent completed or contracted, and approximately $ 220 million in bonds had already been sold.

The defendant communities successfully removed the suit to federal court, alleging that the subject matter of the state court action was inextricably intertwined with the viability of the district court's 1994 consent decree. The district court granted summary judgment in favor of the defendants on the taxpayers' claims that the tax levies violated provisions of the Michigan constitution, finding (1) that the challenge to the constitutionality of the tax levies was barred by laches, (2)

that the court had inherent power to enforce its judgments, and (3) that the Michigan state constitutional provision invoked by the plaintiffs was not applicable to the tax levies in question, because they were authorized under state statutes that predated the amendment to the state constitution.

ANALYSIS

Before this court, the plaintiffs contend that the district court erred both in denying their motion for remand and in ordering the municipalities to raise taxes without a vote of the citizenry, allegedly in violation of a "tax revolt" provision of the state constitution.

A. Jurisdiction

The district court correctly noted that implementation and enforcement of compliance with the 1994 consent decree gave it continued jurisdiction over the financing agreements that constituted an integral part of the order, citing Vanguards of Cleveland v. City of Cleveland, 23 F.3d 1013, 1018 (6th Cir. 1994). The court further found that the instant suit "poses an imminent threat to the integrity of the Financing Orders because it could adversely affect the financing mechanism in those orders." We agree.

We also agree that the district court correctly invoked 28 U.S.C. § 1651(a), the All Writs Act, which gives federal courts the "authority to remove an otherwise unremovable state court case in order to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." In re Agent Orange Prod. Liab. Litig., 996 F.2d 1425, 1431 (2d Cir. 1993) (internal quotation marks omitted). It follows that the district court did not err in denying the plaintiffs' motion to remand to state court.

B. Application of the Doctrine of Laches

In a detailed and well-reasoned opinion, the district court ordered summary judgment for the defendants on three alternative bases. Because we conclude that the challenge to the consent decree is barred by the doctrine of laches, we find it unnecessary to reach the question of the district court's inherent authority to order the levy of taxes in this case, and we decline to interpret the scope of the Michigan Constitution, an exercise better left to the Michigan state courts.

The doctrine of laches is an equitable principle that bars recovery in circumstances in which a plaintiff's delay in seeking a judicial remedy prejudices a defendant. To prevail, a party invoking this equitable principle "must show that plaintiffs unreasonably delayed in bringing suit and that [defendants] were prejudiced by this delay." Environmental Defense Fund v. Tennessee Valley Auth., 468 F.2d 1164, 1182 (6th Cir. 1972). In this case, the district court found that the plaintiffs had waited to initiate their action until after the municipal bonds to finance the court-ordered sewer project had been authorized, issued, and sold. As noted above, by the time the hearing occurred, the project was 85 percent complete, at a cost of over $ 200 million. The court further found that the plaintiffs had had ample notice of the defendants' intent to implement the consent decree through the financing agreements contained in that order and yet did not file suit until three years after they received their first assessment. Finally, the court found that the defendants were obviously prejudiced by the delay, given the outlay of funds already expended and the near-completeness of the entire project. With this conclusion, we also agree.

CONCLUSION

After a careful review of the briefs and the record in this case, and having had the benefit of oral argument, we are not persuaded that the district court erred in retaining jurisdiction and in deciding that the action was barred by laches. Moreover, because the reasons for dismissing the complaint against the defendants were fully articulated in the district court's opinions, we conclude that the issuance of another detailed opinion is unnecessary to the correct determination of this appeal. We therefore AFFIRM the judgment of the district court, as provided in its order and opinion denying plaintiffs' motion to remand, dated June 9, 1998, and its opinion and order granting defendants' motion for summary judgment of the same date.

GLORIA BYLINSKI, GLORIA BELLMAN, ALLAN COLLINS, DENNIS COATES, DOUGLAS HAMMAR, ROBIN HAMMAR, SANDRA HOLIDAY, STEVEN HOLIDAY, ROBERT JARRELL, ANISE PIERCE, RICHARD PRESSEY, JIMMY SEACRIST, and MOLLY SEACRIST, and all other persons similarly situated, Plaintiffs, v. CITY OF ALLEN PARK, a Michigan municipal corporation, CHARTER TOWNSHIP OF BROWNSTOWN, a Michigan municipal corporation, CITY OF ECORSE, a Michigan municipal corporation, CITY OF LINCOLN PARK, a Michigan municipal corporation, CITY OF RIVER ROUGE, a Michigan municipal corporation, CITY OF ROMULUS, a Michigan municipal corporation, CITY OF SOUTHGATE, a Michigan municipal corporation, CITY OF TAYLOR, a Michigan municipal corporation, Defendants.

Civil Action No. 98-71289

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

June 9, 1998, Decided
June 9, 1998, Filed

COUNSEL: For Plaintiffs: Peter W. Macuga, II, Rene S. Roupinian, Macuga, Swartz and Liddle, Detroit, MI.

For Cities of Allen Park, Ecorse, Lincoln Park, River Rouge, Romulus, Southgate and Taylor, Defendants: R. Craig Hupp, Charles N. Raimi, Bodman, Longley & Dahling, Detroit, MI.

For City of Lincoln Park, Defendant: Edward M. Zelenak, Lincoln Park, MI.

For City of Taylor, Defendant: Patrick B. McCauley, Sommers, Schwartz, Silver & Schwartz, Southfield, MI.

For City of Ecorse, Defendant: Victor T. Mitea, Taylor, MI.

For City of Southgate, Defendant: John F. Gilhool, Southgate, MI.

For City of Allen Park, Defendant: Kenneth D. Kruse, Pagnucco, Kruse & Tamsen, Allen Park, MI.

For City of River Rouge, Defendant: David A. Bower, River Rouge, MI.

JUDGES: John Feikens, United States District Judge.

OPINIONBY: John Feikens

OPINION: OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs Bylinski et al., representative taxpayers in defendant municipalities, bring this action against defendants City of Allen Park et al. to obtain a refund of and to enjoin further collection of property taxes imposed by the municipalities pursuant to a consent decree entered by me on May 12, 1994. United States v. Wayne County, 1994 U.S. Dist. LEXIS 18775, Civil Action No. 87-70992 (E.D. Mich. 1994) ("Wayne County"). The Wayne County consent decree references the structure of the Downriver Sewage Disposal System 1994 Financing Plan and Final Judgment Re: 1994 Court-Ordered Improvements ("Plan"). It is a comprehensive scheme of sewer improvements intended to bring these

defendant municipalities into compliance with the Clean Water Act, 33 U.S.C. §§ 1251 et seq.

In 1987, the United States Environmental Protection Agency (EPA) and the Michigan Department of Natural Resources (now MDEQ) brought the Downriver Sewer Case (Wayne County) against Wayne County, owner and operator of the Wyandotte Wastewater Treatment Plant (WWTP). These regulatory agencies added the local government units of thirteen municipalities served by the WWTP, the Southgate-Wyandotte Relief Drainage District, and the Ecorse Creek Pollution Abatement Drain (collectively the "Downriver Communities") as defendants in an amended complaint. Defendant municipalities in the current case are among the Downriver Communities in Wayne County. n1 The WWTP is operated by Wayne County pursuant to a contract with the Downriver Communities dated March 1, 1962 (as amended from time to time).

The EPA and MDEQ alleged that the WWTP violated the provisions of the Federal Clean Water Act, 33 U.S.C. §§ 1251 et seq., and the Michigan Water Resources Commission Act, M.C.L. §§ 323.1 et seq., and that the wastewater flows from the Downriver Communities were a major contributing factor in the failure of the WWTP to comply with these Acts. The parties engaged in a court-supervised process to study, design, construct, and fund sewer system improvements intended expeditiously to protect public health and to bring WWTP operations into compliance with the mandates of the Federal Clean Water Act and the Michigan Water Resources Commission Act. A monitor and a special master oversaw the process to insure adequate progress toward achieving project goals, and to report to the court.

In resolution of the claims in Wayne County, I entered a Consent Decree (dated February 11, 1994) approving the

agreement between the Wayne County parties. n2 I also entered an order approving the Plan (dated May 12, 1994, effective March 14, 1994). The Plan defines the process by which the improvements constructed pursuant to the Consent Decree will be financed. In paragraph nine of the Wayne County judgment I stated:

> Need for the Improvements. This Court specifically finds, based on its review of applicable law and the Project Plan, that (i) the improvements are needed to comply with the Federal Water Pollution Control Act and Act 245; and (ii) the installation, construction, alteration, improvement and operation of the Downriver Sewage Disposal System, as described with the improvements, have been ordered in accordance with the Consent Decree, Act 320, Act 245, and the Federal Clean Water Act.

In their complaint in this action, plaintiffs falsely stated: "There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in this complaint." Notwithstanding that statement, plaintiffs seek to enjoin defendants' compliance with the Plan. Ignoring the Wayne County order of May 12, 1994 forbidding litigation of this type, and ignoring the provisions of the Consent Decree reserving continuing jurisdiction of this court in all matters pertaining to the Consent Decree, they brought this action in state court. Defendants removed the case to this court. Plaintiffs claim that property taxes imposed by the municipalities to satisfy the mandates in the Plan are illegal and unconstitutional because the mandates in the Plan run counter to the Headlee amendment to the Michigan Constitution in that the taxes imposed by the defendant communities exceed limits set by state law. They contend that

because defendants levy these taxes without the approval of a majority of the qualified voters of the applicable local unit of government, they are not proper levies.

The Headlee amendment states: "Property taxes and other local taxes and state taxation and spending may not be increased above the limitations specified herein without direct voter approval. . . ." MICH. CONST. of 1963, art. 9, § 25 (amended 1978). Article 9, §§ 26-34 of the Michigan Constitution implements the Headlee amendment. The key section states:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon. . . .

MICH. CONST. of 1963, art. 9, § 31 (amended 1978).

Plaintiffs seek enforcement of their contentions by summary judgment. Defendants reply that plaintiffs' claims are barred by laches, that the Headlee amendment does not apply because the taxes at issue are levied pursuant to statutes that predate that amendment and are levied pursuant to this court's approval of the Consent Decree, and that this court has inherent power to enforce the Consent Decree and the Plan by ordering these local government units to levy taxes, even if these taxes exceed state statutory or constitutional limits.

Defendants also move for summary judgment. I address defendants' motion for summary judgment first.

II. SUMMARY JUDGMENT STANDARD

Summary judgment must issue when there is no genuine issue as to any material fact, based on the pleadings, depositions, answers to interrogatories, admissions of the parties, and any affidavits. FED. R. CIV. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). Movants have the burden of proving there is no genuine issue of material fact. Id. Once movants meet this burden, nonmovants "must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). Where movants bring a motion for summary judgment, although the trial court views the evidence in a light most favorable to nonmovants, Terry Barr Sales Agency, Inc. v. All-Lock Co., 96 F.3d 174, 178 (6th Cir. 1996) (citation omitted), nonmovants must nonetheless present significant probative evidence to support their claim. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). "The mere existence of a scintilla of evidence in support of the [nonmovants'] position will be insufficient; there must be evidence on which the jury could reasonably find for [nonmovants]." Anderson, 477 U.S. at 252.

III. ANALYSIS

Defendants seek summary judgment based on three legal premises: (a) laches; (b) the tax levy is not subject to the provisions of the Headlee amendment because the effective dates of the statutes pursuant to which the levy is imposed predate the effective date of that amendment; and (c) federal courts have inherent power to order local government units to levy taxes to pay their debt obligations, even if those taxes

exceed state statutory or constitutional tax limits. I address this court's inherent power first.

A. Federal court's inherent power to order local government unit to levy tax.

In my approval of the Plan, I ordered the Downriver Communities to pay their share costs in cash. However, the order also stated that in the event any community failed to pay in cash, the Plan provides a procedure by which the community's assessing officer shall assess the judgment payments in accordance with M.C.L. § 600.6093. The defendant municipalities in this case did not pay their share costs in cash. Therefore, under the terms of the Plan pursuant to court order, these communities were obligated to levy taxes to pay their share costs.

In City of Detroit v. City of Highland Park, 878 F. Supp. 87 (E.D. Mich. 1995), I held that a local government tax increase necessitated by a valid federal court judgment is not within the provisions of the Headlee amendment prohibiting unauthorized tax increases. Id. at 89. I also held that "state law cannot prevent a federal judge from enforcing his judgments." Id.

Plaintiffs' entire case relies on the Michigan Court of Appeals' dismissal of these statements in American Axle & Mfg., Inc. v. City of Hamtramck, 227 Mich. App. 135, 143, 575 N.W.2d 296, 299-300 (1997). In American Axle, the City of Hamtramck (Hamtramck) appealed from a Michigan Tax Tribunal order granting summary judgment for American Axle & Manufacturing, Inc. (American) in American's action challenging Hamtramck's tax assessment levied under M.C.L. § 600.6093. The court in American Axle affirmed the trial court's decision and stated that despite the ruling in

Detroit, supra, the lack of analysis of the issue of a judgment levy raising taxes beyond the constitutionally proscribed level, along with the [Detroit] court's dismissal of further analysis with the statement that Michigan law cannot prevent the enforcement of the federal court's judgment, leads us to believe that Detroit should be of little persuasive value in this matter.

American Axle, 227 Mich. App. at 143.

The opinion in American Axle is not controlling and is inapposite. American Axle refers only to decisions and orders made by state courts. That court applied state constitutional limits to the total amount of taxes imposed on property owners, despite its admission that the Headlee amendment did not apply to the statute pursuant to which the additional taxes were imposed. The reasoning in American Axle is erroneous and clearly inapplicable in cases in which local government units impose taxes that exceed state constitutional or statutory limitations, pursuant to federal court orders. American Axle overlooks and disregards federal cases that teach that neither state laws nor state constitutions control a federal court's application or enforcement of federal law. In particular, in its dismissal of the reasoning in Detroit, the court in American Axle failed to address Missouri v. Jenkins, 495 U.S. 33, 109 L. Ed. 2d 31, 110 S. Ct. 1651 (1990).

In Jenkins, state law authorized the Kansas City, Missouri, School District to assess local property taxes only up to $ 1.25 per $ 100 of property valuation unless a majority of the voters in the district approved a higher levy, up to a limit of $ 3.25 per $ 100. The statute stated that the school district could assess a levy higher than $ 3.25 only if two-thirds or more of the voters approved. n3 The United States Supreme Court held that a federal district court could enjoin the

operation of state laws or constitutional provisions that prevented a local government unit from raising property taxes beyond prescribed limits without an electorate vote, and order the local government unit to levy taxes adequate to fund its obligations under a federal court order: "[A] court order directing a local government body to levy its own taxes is plainly a judicial act within the power of a federal court." Jenkins, 495 U.S. at 55 (citing Griffin v. Prince Edward County Sch. Bd., 377 U.S. 218, 233, 12 L. Ed. 2d 256, 84 S. Ct. 1226 (1964)). The Court stated:

> Griffin followed a long and venerable line of cases in which this Court held that federal courts could issue the writ of mandamus to compel local governmental bodies to levy taxes adequate to satisfy their debt obligations. See, e.g., Louisiana ex rel. Hubert v. Mayor and Council of New Orleans, 215 U.S. 170, 54 L. Ed. 144, 30 S. Ct. 40, . . . (1909); Graham v. Folsom, 200 U.S. 248, 50 L. Ed. 464, 26 S. Ct. 245, . . . (1906); Wolff v. New Orleans, 103 U.S. 358, 26 L. Ed. 395, . . . (1881); United States v. New Orleans, 98 U.S. 381, 25 L. Ed. 225,. . . (1879); Heine v. Levee Commissioners, 86 U.S. 655, 19 Wall. 655, 657, 22 L. Ed. 223 (1874); City of Galena v. Amy, 72 U.S. 705, 5 Wall. 705, 18 L. Ed. 560 (1867); Von Hoffman v. City of Quincy, 71 U.S. 535, 4 Wall. 535, 18 L. Ed. 403 (186[6]); Board of Commissioners of Knox County v. Aspinwall, 65 U.S. 376, 24 HOW 376, 16 L. Ed. 735 (1861).

Jenkins, 495 U.S. at 55-56 (emphasis added). Addressing the State's argument that even under these cases "the federal judicial power can go no further than to require local

governments to levy taxes as authorized under state law," the Court disagreed and noted that "this argument was rejected as early as Von Hoffman v. City of Quincy . . . ." Id. at 56; Von Hoffman v. City of Quincy, 71 U.S. 535, 4 Wall. 535, 18 L. Ed. 403 (1866)). Finally, the Court stated, "It is . . . clear that a local government with taxing authority may be ordered to levy taxes in excess of the limit set by state statute where there is reason based in the [United States] Constitution for not observing the statutory limitation." Id. 495 U.S. at 57.

The Consent Decree and orders in Wayne County remedy the defendant municipalities' violation of federal law. In oral argument on the summary judgment motions in this case, plaintiffs' counsel asserted that the Headlee amendment must violate federal law before a federal court may order a Michigan local government unit to impose taxes that exceed the limitations imposed by that amendment. That is not correct. Under Jenkins, when a federal court determines that a local municipality's actions violate a federal statute that is based on provisions of the United States Constitution (in this case defendant municipalities violated the Federal Clean Water Act, 33 U.S.C. §§ 1251 et seq., enacted by Congress empowered by provisions in the Constitution), the court may order a local government unit with taxing authority to levy taxes adequate to satisfy the municipality's debt obligations incurred in complying with federal law, even if the taxes exceed state constitutional and statutory limitations. In other words, Jenkins permits a federal court to enjoin operation of state statutes and constitutional provisions prohibiting a local government unit from levying taxes at a rate above limits set by state law without majority electorate approval. n4 Thus, the defendant municipalities' tax levies are valid and enforceable, even if the Headlee amendment would otherwise apply.

1. Constitutional basis: General health and welfare.

The United States Constitution grants Congress the power to provide for the general welfare of the United States. U.S. Const., art. I, § 8, cl. 1. In H.R. REP. No. 89-215 (1965), the Committee on Public Works, to whom a bill to amend the Federal Water Pollution Control Act (now known as the Clean Water Act, 33 U.S.C. §§ 1251 et seq.) to establish the Federal Water Pollution Control Administration was referred, stated:

> No more important single problem faces this country today than the problem of "good water." Water is our greatest single natural resource. The issue of pure water must be settled now for the benefit not only of this generation but for untold generations to come. The need for good quality water for all of our Nation's uses--public and private--is a paramount one.
>
> * * *
>
> The Committee on Public Works has been fully aware of this basic problem and from this committee came the first legislation that brought into full focus this problem of water pollution and water quality.

H.R. REP. No. 89-215, at 1 (1965) (emphasis added). This states Congress' intention that this Act protect, and improve, the general welfare of the United States. In United States v. Aluminum Co. of Am., 824 F. Supp. 640 (E.D. Tex. 1993), the court notes that "the objective of the [Clean Water Act] is to protect human health, welfare, and the environment, to eliminate the discharge of all pollutants to waters of [**17] the United States, and to restore the chemical, physical, and biological integrity of the Nation's waters." Id. at 645 (citing

33 U.S.C. § 1251(a)). Thus, this court's enforcement of the consent decree to levy taxes to correct water pollution problems pursuant to the provisions of the Clean Water Act (despite a state statutory limitation on taxation) has a Constitutional basis, and is valid under the Missouri v. Jenkins reasoning.

2. Constitutional basis: Commerce Clause.

Congress may use its power under the Commerce Clause to regulate interstate commerce and any matter that might significantly impact on interstate commerce, including pollution of the navigable waters of the United States. U.S. Const., art. I, § 8, cl. 3; See, e.g., United States v. Holland, 373 F. Supp. 665, 671-73 (M.D. Fla. 1974) (stating Congress intended to use the full extent of the commerce power under the Constitution to protect and improve the waters of the United States). One commentator notes that "federal authority under the commerce clause is extensive. Activities can be regulated under the clause because of their effect on interstate commerce." FRANK F. SKILLERN, ENVIRONMENTAL PROTECTION DESKBOOK § 4.04 (2d ed. 1995). This includes activities resulting in pollution of the waters of the United States, such pollution having an effect on, or the potential to effect, interstate commerce. Congress' commerce power is another Constitutional basis for this court's enforcement of a local government unit tax levy to satisfy the mandates of the Clean Water Act, despite state statutory or constitutional limitations on taxation.

B. Laches.

Plaintiffs' claims are also barred by laches. "To demonstrate laches, a party must establish '(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.'" Apache Survival

Coalition v. United States, 21 F.3d 895, 905 (9th Cir. 1994) (quoting Costello v. United States, 365 U.S. 265, 282, 5 L. Ed. 2d 551, 81 S. Ct. 534 (1961)); S.E.R., Jobs For Progress, Inc. v. United States, 759 F.2d 1, 5 (Fed. Cir. 1985); Environmental Defense Fund v. Tennessee Valley Auth., 468 F.2d 1164, 1182 (6th Cir. 1972) (stating: "To prevail, appellants must show that plaintiffs unreasonably delayed in bringing suit and that appellants were prejudiced by this delay. . . ."). "The application of the laches doctrine is within the sound discretion of the district court." Azalea Fleet, Inc. v. Dreyfus Supply & Mach. Corp., 782 F.2d 1455, 1458 (8th Cir. 1986) (citing Gardner v. Panama R.R., 342 U.S. 29, 30, 96 L. Ed. 31, 72 S. Ct. 12 (1951)).

Here, defendants correctly assert that plaintiffs waited to institute their suit until after bonds had been issued and sold. Indeed, the project addressed by the Wayne County consent decree and related orders is 85% compete. Through publication and public hearings, plaintiffs had ample notice of defendants' intentions to finance the project through bond sales. Yet plaintiffs did not bring this suit until three years after first being assessed for the cost of the sewer and waste water treatment improvements, after more than $ 220 million in bonds had been sold, and after the improvement project was 85% completed. Plaintiffs' delay clearly prejudices defendant municipalities. For this reason, it is inequitable to enforce plaintiffs' claims against defendants; they are barred by laches.

Notably, although Michigan law does not control in this action, it does apply to plaintiffs' Headlee amendment claim and is consistent with federal case law. Michigan law states that where a plaintiffs claims are untimely, a court may "refuse to adjudicate on the merits the claims set forth in the complaint." Eby v. Lansing Bd. of Water & Light, 417 Mich. 297, 306 n.10, 336 N.W.2d 205 (1983) (citing Bigger v. City

of Pontiac, 390 Mich. 1, 210 N.W.2d 1 (1973)). The doctrine of laches is an equitable principle that bars recovery in circumstances in which a plaintiff's delay in seeking judicial remedy prejudices a defendant. "Laches is not the mere passage of time, but is rather the passage of time combined with a change in condition which would make it inequitable to enforce a claim against the defendant." Tray v. Whitney, 35 Mich. App. 529, 536, 192 N.W.2d 628 (1971). However, statutes of limitation may apply by analogy to equitable claims. Taxpayers Allied for Constitutional Taxation v. Wayne County, 450 Mich. 119, 127 n.9, 537 N.W.2d 596 (1995).

Michigan courts have applied the laches doctrine to bar Headlee claims. See Bigger v. City of Pontiac, 390 Mich. 1, 4-5, 210 N.W.2d 1 (1973) (stating that in cases holding that in the financing of public projects by municipalities, if objecting plaintiffs do not resort to the courts "within the context of the time available for adjudication" and without delay, courts may refuse to hear the cases); Sessa v. Macomb County, 220 Mich. App. 279, 286-88, 559 N.W.2d 70 (1996) (stating that even though plaintiffs brought suit within an applicable one year statute of limitations pursuant to M.C.L. § 600.308a(3), identical to the statute of limitations for Headlee-type claims, the suit was barred by laches). As interpreted by the court in Sessa, the preclusive doctrine of laches, detailed in Bigger, 390 Mich. at 4-5, "is designed to deal with challenges that could prevent or frustrate public improvements in general." Sessa, 220 Mich. App. at 286. The court in Sessa also noted:

> An equally important aspect of the Bigger rule comes into play here where suit was not begun until after the bonds had been issued and sold on the open market. The interests of third parties, the bondholders, who are bona fide

> purchasers for value and who, at the time of purchase, were not on notice of any such challenge, represents a vested interest that the entertaining of such litigation on its merits could defeat. In this regard, therefore, the Bigger rule is distinct from the statute of limitations and simply obligates those who would challenge such action to move promptly.

Sessa, 220 Mich. App. at 287 (citing Walled Lake Consol. Sch. Dist. v. Commerce Charter Township, 174 Mich. App. 434, 436-37, 437 N.W.2d 16 (1989)) (emphasis in original).

Sessa noted that although the Bigger rule predates the 1978 Headlee amendment to the Michigan constitution, it is not undermined by that amendment.

> Nothing in the text of Const 1963, art 9, §§ 25-34 addresses the Bigger principle or purports to limit or abolish it in taxpayers [sic] suits authorized by Const 1963, art 9, § 32 [the standing/enforcement provision]. The Legislature has carefully protected taxpayer interest in this regard, however, in fulfillment of the mandate of Const 1963, art 9, § 34, by requiring notice of intent to bond to be published, MCL 123.958b(3); MSA 5.301(8b)(3).

Sessa, 220 Mich. App. at 287. Bigger applies even if plaintiff's claim is legal rather than equitable.

That plaintiff couches part of its claim as legal rather than equitable does not distinguish this case from Bigger. The import of Bigger is that where a plaintiff seeks to employ the

judicial process to challenge a project duly adopted by the appropriate government officials, it must do so in a timely manner. . . . In this instance, waiting for two years to enjoin the plan's proposed method of collecting revenue or to compel the payment of revenue to plaintiff is not justified.

Walled Lake Consol. Sch. Dist., 174 Mich. App. at 438. Thus, both Federal and Michigan laches doctrine bar plaintiffs' claims.

C. Tax levy not subject to the provisions of the Headlee amendment.

When laches prevents a suit, the court need not consider constitutional challenges in that case. Thatcher Enterprises v. Cache County Corp., 902 F.2d 1472, 1475-76 (10th Cir. 1990) (stating that because plaintiffs waited seventeen years from the time they should have known, and nine years from the time they actually knew, of the County's actions to make challenges to a zoning ordinance, plaintiffs' constitutional challenges were barred by laches); Peter Henderson Oil Co. v. City of Port Arthur, Texas, 806 F.2d 1273, 1275 (5th Cir. 1987) (stating that because appellants waited over five years after the cause of action arose to challenge an unconstitutional delegation, the challenge was barred by laches); see also Edel v. Filer Township, 49 Mich. App. 210, 211 N.W.2d 547 (1973). I nevertheless address plaintiffs' constitutional (Headlee amendment) challenges under Michigan law. n5

In oral argument, plaintiffs' counsel began with a misinterpretation of the Headlee amendment, stating that "Michigan law is clear, at section thirty-one of the Headlee amendment to [the] Michigan Constitution, that any tax not in existence on November 7th, 1978, or authorized to exist by ordinance or statute is unconstitutional if not approved by the

people before imposition and collection." A correct reading of the Headlee amendment, MICH. CONST. art. 9, § 31 (ratified Nov. 7, 1978, effective Dec. 23, 1978), is that it prohibits local government units from levying any tax not authorized by law or charter, and from increasing the rate of an existing tax above that rate authorized by law or charter, existing when the amendment was ratified, without approval of a majority of the electorate of that local government by vote.

The Headlee amendment "does not apply to taxes imposed for the payment of principal and interest on bonds or other evidence of indebtedness or for the payment of assessments on contract obligations in anticipation of which bonds are issued which were authorized prior to the effective date of this amendment." MICH. CONST. art. 9, § 31. The requirement that the tax be authorized by law or charter requires only that "a local government be empowered to levy the tax on the date that the Headlee Amendment was ratified, even if the local government had not exercised its authority." Bailey v. Muskegon County Bd. of Comm'rs. 122 Mich. App. 808, 821, 333 N.W.2d 144 (1983) (emphasis in original).

If Michigan law controlled in this case, the Headlee amendment would still not apply to the taxes levied because the levies are authorized by Act 320 (the Court Order Bond Act), amended and recodified as M.C.L. § 324.4307, and Act 326 (the Judgment Levy Act), amended and codified as M.C.L. § 600.6093. Both statutes were in effect before ratification of the Headlee amendment. The 1994 Financing Order and Final Judgment Plan and Consent Decree in the Wayne County case make explicit reference to these statutes.

1. Act 320 (M.C.L. § 324.4307) predates the Headlee amendment.

The Headlee amendment does not apply because Act 320 predates it. The Court Order Bond Act (Act 320), M.C.L. § 324.4307, was originally enacted in 1927, long before ratification of the Headlee amendment. M.C.L. § 324.4307 empowers the defendants in this case to levy taxes for the purposes enumerated in the Wayne County 1994 Financing Plan and Final Judgment (sewage system and water treatment facilities construction, improvements, and operation). That defendants did not actually levy taxes until some date after ratification of the Headlee amendment is irrelevant.

Defendant municipalities were authorized by law to impose such a tax prior to ratification of that amendment. Thus, by the terms of both the Headlee amendment and M.C.L. § 324.4307 the taxes levied in this case are not subject to Headlee amendment restrictions.

The tax assessments levied against property owners in the defendant municipalities are imposed pursuant to Act 320. The Plan and Consent Decree make explicit reference to Act 320 as a statute pursuant to which the taxes at issue would be imposed:

The Court may enter as required an order pursuant to said Act 320 regarding the terms and conditions of the contracts, bonds and other documents to be executed and delivered by the legislative bodies of Defendant in accordance with this paragraph, provided such order in no way alters, modifies, or conflicts with the deadlines, obligations, or items set forth in this Decree or set forth by applicable federal or state law.

Wayne County Consent Decree, Section XIV, Funding P 49 (emphasis added). The Wayne County and Downriver Communities financing resolutions reference this statute. "WHEREAS, Wayne [County] proposes to authorize the issuance of the Bonds, pursuant to Act 320 in anticipation of

and secured payments by the Judgment payments . . . and other things necessary to the authorization [**28] and issuance of the Bonds under Act 320 having been provided for . . . ." Wayne County Resolution 94-81, pp. 3-4 (February 17, 1994).

Act 320, M.C.L. § 324.4307, permits local government units to issue and sell the necessary bonds to fund "construction, installation, alteration, operation, or improvement, including the treatment works, and other facilities" of a "sewage system, solid waste facility, or waterworks system." M.C.L. § 324.4307(1).

The amount of the bonds either issued or outstanding shall not be included in the amount of bonds which the local unit or units of government are authorized to issue under any statutes of this state or charters. Local units of government issuing bonds under this section may raise a sum annually by taxation as the legislative body or respective legislative bodies consider necessary to pay interest on the bonds, and to pay the principal as it falls due. The annual amount may be in excess of the authorized annual tax rate fixed by the statutes or charters.

M.C.L. § 324.4307(1) (emphasis added). This section also states: "Court ordered bonds do not require approval of the electors . . . . Bonds other than court ordered bonds issued under this part require approval of the electors at a general or special election only if an appropriate petition is filed in accordance with the law." M.C.L. § 324.4307(2). Thus, not only is the funding scheme in the Consent Decree authorized by this statute, it is also specifically exempted from Headlee amendment requirements. Voter approval is not required under circumstances in which local government units, pursuant to court order and this statute, issued and sold bonds

to fund sewage and water works system improvements to effectuate compliance with federal law.

2. Act 236 (M.C.L. § 600.6093) predates the Headlee amendment.

The Headlee amendment does not apply because Act 236 predates it. The Judgment Levy Statute, Act 236, originally enacted in 1963, and later amended, empowers municipalities to assess taxes necessary to pay judgments against the municipalities or officers of the municipalities in their name of office. M.C.L. § 600.6093. The statute predates the Headlee amendment, and therefore is not controlled by the restrictions of that amendment. See City of Detroit v. City of Highland Park, 878 F. Supp. 87, 89 (E.D. Mich. 1995).

Bailey v. Muskegon County Bd. of Comm'rs, 122 Mich. App. 808, 821, 333 N.W.2d 144 (1983), supports exemption of this statute from the Headlee amendment requiring electorate approval. "The Headlee Amendment imposes specific limitations on the authority to impose additional taxes without voter approval. It does not require voter approval of increased tax levies where the authority to make the levy has already been approved." Smith v. Scio Township, 173 Mich. App. 381, 388, 433 N.W.2d 855 (1988) (citing Bailey). As discussed in section III(A), supra, federal law overrides state law in the instant case, and supports the defendant municipalities' imposition of taxes that exceed Michigan constitutional limitations, in compliance with my orders. However, even if Michigan law applied, because the taxes levied pursuant to the Wayne County 1994 Financing Plan and Final Judgment were levied pursuant to statutes enacted prior to ratification of the Headlee amendment, those tax levies are not subject to voter approval or other limitations imposed by that amendment, and plaintiffs' claim must be denied.

The Plan specifically refers to Act 236 as a statute authorizing the imposition of taxes on property owners in resolution of the defendant municipalities' debt obligations as determined in Wayne County:

> With respect to any Downriver Community that does not pay its Judgment Payment . . . in cash prior to the closing date for the sale of Wayne's bonds a certified copy of this 1994 Financing Plan and Final Judgment shall be filed with the assessing officer of each Downriver Community that is a city . . . pursuant to Section 6093 of Act 236. . . and this 1994 Financing Plan and Final Judgment.

Wayne County 1994 Financing Plan and Final Judgment, P 8, p. 12.

In oral argument plaintiffs' counsel asserted that my order pursuant to Act 320 and Act 236 must be minimally intrusive. In Wayne County I did this when I ordered the municipalities to pay their share costs in cash. I did not restrict the methods by which they might procure this cash. I could not have given a less intrusive order.

My order directing defendant municipalities to levy taxes to pay their costs became effective only if they did not pay their share costs in cash. Although plaintiffs' assertions implicitly assume that I could not order the levy of taxes until after an actual violation of the minimally intrusive order, nowhere in Jenkins does the Supreme Court state that a federal court must wait until a local government unit violates its minimally intrusive orders to delineate contingent orders to enforce its judgment. See Missouri v. Jenkins, 495 U.S. 33, 109 L. Ed. 2d 31, 110 S. Ct. 1651 (1990).

CONCLUSION

Defendants are entitled to summary judgment on three legal premises: (a) the inherent power of federal courts to order local government units to levy taxes to pay their debt obligations, to carry out federal court ordered and approved consent decrees and their financing plans, even if those taxes exceed state statutory or constitutional tax limits; (b) laches; and (c) inapplicability of the Headlee amendment.

IT IS SO ORDERED.

John Feikens

United States District Judge

Dated: June 9, 1998

GLORIA BYLINSKI, GLORIA BELLMAN, ALLAN COLLINS, DENNIS COATES, DOUGLAS HAMMAR, ROBIN HAMMAR, SANDRA HOLIDAY, STEVEN HOLIDAY, ROBERT JARRELL, ANISE PIERCE, RICHARD PRESSEY, JIMMY SEACRIST, and MOLLY SEACRIST, and all other persons similarly situated, Plaintiffs, v. CITY OF ALLEN PARK, a Michigan municipal corporation, CHARTER TOWNSHIP OF BROWNSTOWN, a Michigan municipal corporation, CITY OF ECORSE, a Michigan municipal corporation, CITY OF LINCOLN PARK, a Michigan municipal corporation, CITY OF RIVER ROUGE, a Michigan municipal corporation, CITY OF ROMULUS, a Michigan municipal corporation, CITY OF SOUTHGATE, a Michigan municipal corporation, CITY OF TAYLOR, a Michigan municipal corporation, Defendants.

Civil Action No. 98-71289

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Filed: June 9, 998

OPINION AND ORDER

DENYING PLAINTIFFS' MOTION TO REMAND

I. INTRODUCTION

Plaintiffs Blinks et al., representative taxpayers in defendant municipalities, bring this action against defendants City of Allen Park et *al.* to obtain a refund of and to enjoin further collection of property taxes imposed by the

municipalities pursuant to a consent decree entered by moon May 12, 1994. *United States v. Wayne County,* Civil Action No, 87-70992 (E.D. Mich 1994) *(Wayne County).* The *Wayne County* consent decree references the *Downriver Sewage Disposal System 1994 Financing Plan and Final Judgment Re: 1994 Court Ordered improvements* (Plan). The Plan is part of a comprehensive scheme *of sewer* improvements intended to bring the defendant municipalities into compliance with the Clean Water Act, 33

U.S.C. §§ 1251 *et seq.*

Before me is plaintiffs' motion to remand this case to the Wayne County Circuit Court. This opinion supplements my findings in the hearing on this motion,

II. ANALYSIS

As stated in defendants' brief in opposition to plaintiffs' motion to remand, implementation and enforcement of compliance with the 1994 Financing Order and Final Judgment entered by this court in *Wayne County* are within this court's continued jurisdiction and supervision. The United States Court of Appeals for the Sixth Circuit stated:

> Once approved, the prospective provisions of the consent decree operate as an injunction The injunctive quality of a consent decree compels the approving court to: (1) retain jurisdiction over the decree during the term of its existence, (2) protect the integrity of the decree with its contempt powers, and (3) modify the decree if "changed circumstances" subvert its intended purpose. [I] is well settled that "courts retain the inherent power to enforce

agreements entered into in settlement of litigation pending before them."

Vanguards of Cleveland v. City of Cleveland, 23 F.3d 1013, 1018 (6th Cir. 1994) (citations omitted) (emphasis added), Defendants correctly assert that this suit poses an imminent threat to the integrity of the Financing Orders because it could adversely affect the financing mechanism in those orders. I appropriately retain jurisdiction of any matters that might affect the *Wayne*

County consent decree and its implementation.

My jurisdiction is also appropriate under the All Writs Act, 28 U.S.C. § 1651(a), which gives federal courts the "authority to remove an otherwise unremovable state court case in order to 'effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *In reAgent Orange Product Liability Litigation,* 996 F.2d 1425, 1431 (2d Cir. 1993) (citations omitted),

CONCLUSION

For the reasons stated herein and in the hearing on the motion, plaintiffs' motion to remand is denied.

IT IS SO ORDERED.

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John Feikens
United States District Judge

Dated: 6/9/98